Omahaline Hydraulics Company, a division of Prince Manufacturing Company *and* District No. 7, International Association of Machinists & Aerospace Workers, AFL–CIO. Case 18–CA–16552–1

August 31, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On March 18, 2003, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a cross-exception and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily selecting its striking employees for reduction in force, and by discriminatorily declining to accord them their right to preferential recall to employment upon termination of the strike and their unconditional offer to return to work. This case, then, is all about the Respondent's unlawful discriminatory treatment of its employees because they went on strike.

Our concurring colleague views it as significant that the Respondent did not act in derogation of its statutory obligation to bargain. There is no allegation that it did, and thus our colleague's point is not relevant.

Our colleague believes that the Respondent had a good-faith, albeit ultimately unsubstantiated, belief that its conversion to its new "Demand Flow Technology" production process eliminated the strikers' jobs. We disagree with him, and we agree with the judge's exhaustive analysis and conclusions, in paragraphs 19–23, section II,E of his attached decision, that the Respondent's asserted reliance on its "Demand Flow Technology" in this context was a pretext.

Our colleague believes that the Respondent should be allowed to try to show in compliance that, due to the passage of time, and what our colleague characterizes as unique circumstances, there may no longer be any jobs that are even substantially equivalent to the strikers' prestrike jobs. Passage of time is not part of the analysis of whether a poststrike job is substantially equivalent to a prestrike job, and the judge correctly rejected such an argument in footnote 25 of his attached decision, citing *Brooks Research & Mfg.*, 202 NLRB 634 (1973).

And we disagree with our colleague to the extent that he is analogizing the instant case to the remedial situation presented in *Dean General Contractors*, 285 NLRB 573 (1987), which involved factors that are unique to the construction industry. We have rejected as pretextual the Respondent's reliance on "Demand Flow Technology" as a grounds to deny the strikers reinstatement, and thus it cannot be relied on to deny them reinstatement in compliance. Beyond that, however, we do acknowledge as a matter of general principle, as did the Board in *Dean* itself, that reinstatement and backpay issues ordinarily will be resolved by a factual inquiry during the compliance process. Id. at 575.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Omahaline Hydraulics Company, a division of Prince Manufacturing Company North Sioux City, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Make Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M. Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright whole for any financial loss suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M.Sorenson, Kenny Swi-

[1] We find merit in the General Counsel's cross-exception that the judge erred by failing to include in his recommended Order and notice to employees the standard remedy that the Respondent remove all references to the discharges from the strikers' personnel files, and notify them that it has done so and will not use the discharges against them in any way. See, e.g., *C.R. General, Inc.*, 323 NLRB 494 fn. 3 (1997); *Davey Roofing, Inc.*, 341 NLRB 222 (2004). We shall modify the recommended Order and notice to employees accordingly.

gart, Jesse D. Whittington, and Troy E. Wright, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER SCHAUMBER, concurring.

I agree with my colleagues that the judge properly found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating all of its striking employees while retaining all of its nonstriking employees and, thereafter, refusing to grant preferential recall rights to the former strikers upon their unconditional offer to return to work.[1] In adopting the judge's finding, however, I rely only on the reasons stated below.

It is well settled that an employer violates Section 8(a)(3) and (1) if it fails to reinstate strikers on their unconditional offers to return to work, unless the employer can establish a "legitimate and substantial business justification" for failing to do so. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The employer bears the burden of proving the legitimate and substantial business justification. Id. In *Zimmerman Plumbing & Heating Co.*, 334 NLRB 586, 588 (2001), the Board explained that:

> [O]ne legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions. . . . However, a striker's right to reinstatement does not expire simply because no suitable work is available when he unconditionally offers to return to work. His right to reinstatement continues until his position or a substantially equivalent position becomes available. [Citations omitted].

In the instant case, contrary to the judge, I find no evidence to indicate that the Respondent exhibited bad faith or animus.[2] I do agree, however, that the Respondent did not carry its burden to show a substantial and legitimate business justification for its decision to terminate the strikers and refuse to accord them preferential recall rights. As explained by the judge, the Respondent, through its general manager, Dumas, and employee witness, Harley Van Kirk, failed to show that, as of September 2002 (the date the Union made an unconditional offer to return to work) the implementation of Demand Flow Technology (DFT) changed its work process with the result that the pre- and post-strike jobs were significantly different and the strikers were not qualified to perform the DFT positions. Nor did the Respondent call an independent witness to explain how the jobs dramatically changed.

Finally, it is my view that during the compliance stage of this proceeding the Respondent should be given the opportunity to show that due to the passage of time *and the unique circumstances of the case*, there may not be jobs substantially equivalent to the strikers' prestrike jobs. In a different context, the Board has acknowledged that an employer is not required to reinstate a discriminatee due to changed circumstances. Cf. *Dean General Contractors*, 285 NLRB 573 (1987) (an employer in the construction industry can avoid reinstating the discriminatees by showing in compliance that they would not have continued in the employer's employment after completion of the project for which they would have been hired).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[1] I find it unnecessary to bifurcate the Respondent's unlawful conduct, separating the manner in which the Respondent implemented the reduction in force from its refusal to grant the strikers preferential recall status. The General Counsel alleges only one violation of Sec. 8(a)(3) and (1), i.e., that the Respondent discharged 28 of its employees because those employees engaged in protected, concerted activities, including a strike.

In agreement with my colleagues, I would grant the General Counsel's cross-exception that the judge erred by failing to provide in his recommended Order and notice to employees the standard remedy that the Respondent remove all references to the discharges from the strikers' personnel files, and notify them that it has done so and that it will not use the discharges against them in any way.

[2] I view as significant that the Respondent did not act in derogation of its statutory obligation to the Union. In June 2001, when the Respondent informed the Union that it was transferring its cylinder production to two of its other facilities, it offered to negotiate the effects of the transfer. Similarly, in his October 3, 2002 response to the Union's unconditional offer to return to work, Dumas, the Respondent's general manager, informed the Union that the Respondent would negotiate with it prior to any further layoffs and that it would propose layoff and recall rights for such employees.

Also, I disagree with the judge that the Respondent's argument that it failed to grant the strikers recall rights because it no longer had any positions that were the same or substantially equivalent to the ones held by them prior to the reduction in force due to the implementation of Demand Flow Technology (DFT) was evidence of pretext. In my view, the Respondent had a good-faith belief that the strikers' jobs were eliminated because of the conversion to DFT. The Respondent's failure to establish that the pre- and post-strike jobs were significantly different does not render its acting on its good-faith belief that they were different pretextual.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT select you for inclusion in any reduction in force or otherwise discriminate against you for supporting District No. 7, International Association of Machinists & Aerospace Workers, AFL–CIO, or any other Union, or for engaging in union activities.

WE WILL NOT refuse to offer reinstatement to former striking workers due to their support of District No. 7, International Association of Machinists & Aerospace Workers, AFL–CIO, or any other Union, or for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, devise and implement a preferential system for recall and reinstatement of the following persons to any future vacancies in their former jobs or substantially equivalent jobs: Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M.Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright.

WE WILL, upon the occurrence of any vacancy in a former job or substantially equivalent job, and in accordance with the terms of the preferential recall system, reinstate Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M.Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright.

WE WILL make Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M.Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright whole for any financial loss or loss of other benefits resulting from the manner in which they were selected for reduction in force, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M.Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

OMAHALINE HYDRAULICS COMPANY, A DIVISION OF PRINCE MANUFACTURING COMPANY

Joseph H. Bornong, Esq., for the General Counsel.
Frank B. Wolfe, III, Esq., of Tulsa, Oklahoma, for the Respondent.
Roger N. Nauyalis, of Westchester, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Sioux City, Iowa, on December 16 and 17, 2002. The original charge was filed August 15, 2002, and amended charges were filed October 23 and 29. The complaint was issued October 30.

The complaint alleges that the Company discharged 28 of its employees because those employees engaged in protected concerted activities, including a strike. It is further alleged that this conduct violated Section 8(a)(1) and (3) of the Act. The Company filed an answer denying the material allegations of the complaint.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] Certain errors in the transcript have been noted and corrected.

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures hydraulic pumps and motors at its facility in North Sioux City, South Dakota, where it annually sells and ships from its North Sioux City, South Dakota facility goods valued in excess of $50,000 directly to points outside the State of South Dakota. The Company admits[2] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations Before the Strike and Reconfiguration

Omahaline Hydraulics Company is a division of Prince Manufacturing Corporation, a South Dakota corporation. Its facility is located in North Sioux City, next to Prince's headquarters. The facility covers approximately 40,000 square feet.

Omahaline's general manager is Lynn Dumas. Dumas began his career with Prince Manufacturing as a lathe operator. Eventually, he became an industrial engineering department manager and general manager of a division. In October 1999, Dumas was appointed as general manager of Omahaline.

At the time of Dumas' appointment, Omahaline manufactured welded hydraulic cylinders, hydraulic pumps, and hydraulic motors. There were 105 machines used in the manufacturing process. Dumas described the facility as cramped, noting that over 100 machines were "jammed" into the building. (Tr. 57.)

The Company had 70 production employees classified into seven job categories. By far the largest category was for "machinists." These employees performed three job functions, welding, machine operating, and assembling. Dumas testified that the people performing these functions were grouped as machinists for "payroll" purposes. (Tr. 157—158.) He defined the meaning of the term in the Company's usage as "a general term for all those that were involved in production—direct labor production." (Tr. 158.)

The Company's production operations were organized into 22 cells. Each cell contained a number of machines and associated equipment. Machinists were assigned to specific cells. For example, Dumas testified that two machinists were assigned to the PUMPM cell. One employee operated three machines, while the other operated six machines. These two employees did not have regular responsibilities in any other cell.[3]

If a job in a particular cell became vacant, the Company would fill it by a process of bidding. The Company would post a list of such vacancies and all current employees were eligible to bid for them.[4] Employees who performed the same job on another shift were given first priority. If no such employees applied, the position would be filled from any other current employees who sought the job. This included machinists and any other categories of employees. Only if no current employees were interested would the Company fill the job from outside the existing work force. If more than one employee bid for an opening, management would select the more qualified candidate. Because all of the Company's production jobs were compensated at the same rate of pay,[5] Dumas testified that employees would bid on vacancies "to become more valuable to the company and for themselves for self-improvement to have more skills." (Tr. 69.) Once an employee won a bid for a new position, he received on-the-job training from another employee who was already skilled in the work process. Dumas testified that nobody had ever failed to learn a new job through this training process.

Although employees were assigned to specific jobs that had been awarded through the system of bidding, the actual production process was considerably more flexible. Two production employees, Toni Loker and Harley Van Kirk, were called to testify.[6] Each described this flexibility in actual practice. Loker testified that approximately once a month she would be assigned to operate a machine outside her regular job. This would happen when the normal operator of that machine "was gone or if the individual had a lot of testing to do. It would help keep the flow going." (Tr. 232.) Such brief assignments would last for periods from a few hours to a full shift. In addition, there were longer temporary reassignments. These would occur when an employee was on vacation or when equipment in her own cell was in need of repair. This could also occur if there was need for a specific type of part. Such reassignments would last from a day to a week at a time. Loker, a very experienced employee, reported that she received such reassignments approximately every 2 weeks. During the final 6-month period of her active employment, she performed such work in nine different cells.

Van Kirk, a less experienced employee, testified that during this period he was assigned to temporary jobs approximately once a month. Typically, such reassignments would last for a day.

Dumas corroborated the existence of the practice of temporary assignments. In an affidavit, he reported that the machinists were "interchangeable" and that "generally" machinists were cross-trained so as to be able to perform a number of functions. (Tr. 162, 164.) In his trial testimony, he agreed that "most" employees received temporary assignments when fellow workers were ill or on leave. (Tr. 154–155.) In fact, there is evidence that the Company prized the ability to deploy its work force in a flexible manner. Dumas testified that during negotiations, the Union wanted to limit such flexibility. He reported that "The [C]ompany's position is that they needed to be interchangeable. That we need to make certain that we have

[2] See: answer, pars. 2 and 3. (GC Exh. 1g.)

[3] Dumas described the operations in various other cells. In each case, employees operated various numbers of assigned machines within their cell, but did not have regular responsibilities outside that cell.

[4] The record contains examples of the paperwork associated with the bidding process. (R. Exhs. 7 and 8.)

[5] Indeed, Dumas testified that jobs operating very complex machines were paid at the same rate as jobs involving very simple machines.

[6] The Company called Van Kirk, a nonstriking employee. The General Counsel called Loker, a participant in the strike.

the flexibility to assign people where needed." (Tr. 197.)[7] Describing the Company's need to move workers around, Dumas summarized by noting that "we use[d] them where we need[ed] them." (Tr. 187.) In addition to employees categorized as machinists, the Company employed smaller numbers of people in job categories described as materials transfer, maintenance, IRO, shipping/receiving, and ISO/QC. These employees were paid at the same rate as machinists and were authorized to bid for vacant machinist jobs if they so desired.

Approximately 6 months after Dumas' transfer to Omahaline, the Company experienced a large increase in orders for cylinders. As a result, Dumas hired 16 new employees in a relatively brief period. The new hiring, combined with shifting of existing employees to new positions, resulted in the need for a "tremendous" amount of training. (Tr. 97.) Around this time, in July 2000, the Union became the representative of the Company's production employees.

Unfortunately, the rapid expansion of the Company's work force caused quality control problems. Dumas characterized the quality of the Company's cylinders as "atrocious." (Tr. 98.) Inexorably, these difficulties led to dissatisfaction among the customers. In February 2001, Kubota, a major client, greatly reduced its order for cylinders. As a result of the reduced demand, the Company terminated 14 employees. In order to select the employees who would be terminated, the Company devised a sophisticated assessment tool. (GC Exh. 8.) This spreadsheet rated every employee, using a number of selection criteria assessing attendance, number of machines the employee could operate, number of rejected products, possession of specific skills, and record of disciplinary problems. The same rating scale was used for all employees, regardless of their job category and regardless of whether they manufactured cylinders, pumps, or motors. An overall numerical rating was calculated and the 14 employees with the lowest overall ratings were selected for termination.[8] Dumas testified that the Company had no policy or past practice of according such terminated employees any "layoff status" or recall rights. (Tr. 38.)

After these terminations, the Company's problems with cylinder production persisted, leading to the loss of another major customer, Terex. As a result, on May 2, 2001, the Company decided to terminate an additional 20 employees. The Company notified the Union of this decision and offered to negotiate "the criteria for selecting the list of twenty and the effects of that reduction in force." (Tr. 39.)

On the next day, May 3, 2001, the Union called a strike. Dumas' uncontroverted description of the nature of this strike was as an "economic strike over seniority." (Tr. 40.) A total of 34 employees participated in the strike.

Approximately 7 weeks into the strike, on June 21, 2001, the Company notified the Union that it was transferring its cylinder production to Prince's divisions in Sioux City and Yankton.[9] At trial, Dumas was asked to explain the rationale for this decision. He described it as follows.

> The opportunity of taking advantage of the time—of the timing of the change to not penalize customers on deliveries because of the downturn in cylinder business and the available space at the other two production facilities and the restriction of space in our facility. [Tr. 42.]

The Company offered to negotiate the effects of the transfer of cylinder production, but declined to negotiate the transfer itself. Dumas testified that since the reason for the transfer was due to a "space problem" and since the Union couldn't "offer me more space," there was no requirement for such negotiations. (Tr. 43.)

Immediately upon notification of the transfer decision, the Union made a request for information related to the transfer. On June 29, the Company provided some of the requested information. On July 3, the Company ceased cylinder production at the facility and began removing cylinder production equipment in order to transfer it to the other divisions.

B. The Company's Reconfiguration and the Termination of the Strikers

On July 11, 2001, Dumas began attending a 4-day course on Demand Flow Technology. After finishing this course, he decided to adopt this method at Omahaline. Implementation of this conversion began immediately. This included reconfiguration of the production process and training of the nonstriking employees.

At the end of July, the Company provided additional information to the Union in response to the Union's earlier request for cylinder transfer information. Being dissatisfied with the information provided, the Union filed an unfair labor practice charge on August 3. (R. Exh. 1.) After investigation of this charge, the Regional Director responded to the Union by letter dated October 30, 2001. The Regional Director concluded that

> the evidence established that the Employer's decision to transfer all its cylinder production was a change in the nature and scope of its business and was not a mandatory subject of bargaining for which the Employer would have been obligated to provide information. [R. Exh. 2.]

He concluded that the transfer decision was based on underutilized capacity at the Sioux City and Yankton divisions. Noting that the Sioux City division was a union shop, he observed that "there is no evidence that a motivating factor for the transfer is the strike at the Employer's facility." As a result, he refused to issue a complaint.[10]

In February 2002, the Company provided the Union with notice that the discontinuation of cylinder production at Omahaline would result in permanent elimination of some jobs. This was followed by a letter from Dumas dated July 15, advising that terminated employees would be notified by letter on July 31. Dumas opined that "permanent elimination of the

[7] Dumas reported that these negotiations involved the period prior to the Company's reconfiguration in July 2001.

[8] The name of each employee selected for termination is surrounded by a box on the assessment spread sheet. (GC Exh. 8.)

[9] The Union represents the employees in the Sioux City division. The employees in Yankton are unrepresented.

[10] The Regional Director's position has been consistent throughout these proceedings. There has been no contention that the Company's decision to transfer cylinder production was not based on legitimate and substantial business reasons.

strikers' jobs was a natural consequence of the discontinuation of cylinder production and has long been a *fait accompli*." He asserted that the strikers have "no prospects" of returning to work. (R. Exh. 3.) Four days later, the Company "went line live" with Demand Flow Technology. (GC Exhs. 3 and 4.) And, 4 days after that, the Union responded to Dumas' notification of the upcoming termination of strikers by informing the Company that it believed that the Company had "no legal basis" for terminating the strikers and that such an action would result in the filing of an unfair labor practice charge. (R. Exh. 4.)

As planned, on July 31, 2002, the Company mailed termination letters to its striking employees.[11] Each recipient was told that:

> Even if you decided to abandon the strike today, or in the foreseeable future, there would not be a single open job for you to return. No additional positions will be created in the future. [GC Exh. 4.][12]

The letter informed the employees that their termination was effective on July 31, 2002. They were also advised that their 401(k) funds "may be subject to special rules due to your termination." It was suggested that questions about these funds could be directed to the 401(k) administrator.

Dumas testified that the July 31 terminations were not based on selection criteria of the type employed in February 2001. The only selection criterion was the fact that the terminated workers were participating in the strike. Dumas affirmed this reality, albeit reluctantly, during the following exchange during his cross-examination:

> Q. The only selection criteria at that point was the fact they were on strike, was it not?
>
> A. No, it wasn't the selection criteria.
>
> Q. Isn't that how it—isn't that the only thing that determined whether you were laid-off or not laid-off, terminated or not terminated in that decision? Whether you were on strike or not?
>
> A. I'm sorry, ask the question again.
>
> Q. Wasn't—isn't the only distinction between those terminated and those not terminated the fact that the terminated were strikers?
>
> A. You could make that distinction, yes.
>
> Q. So the only selection criteria was the fact that they were on strike, isn't it?
>
> A. There was no selection criteria applied.
>
> Q. Well, I think that's good enough. [Tr. 193.]

On August 15, the Union filed the original unfair labor practice under consideration in this case. (GC Exh. 1a.)

On September 13, 2002, the Union wrote to Dumas, advising him that it was ending its strike. Acting on behalf of the strikers, the Union's letter contained an unconditional offer to return to work. It also made the following demand:

> In the event there is no work for some of these employees at this time, on their behalf, I am requesting that each of the employees who are not recalled on this date be placed on a preferential list to be recalled as soon as opening[s] become available. [GC Exh. 6.]

Dumas testified that he received this letter. He responded on October 3, informing the Union that there were no prospects for work for any of the strikers. As a result, he asserted that "requests for recall and placement on a preferential hiring list have no merit in law or logic." Paradoxically, he went on to tell the Union that the Company intended to negotiate with the Union prior to any further layoffs and that the Company "will propose layoff and recall rights" for such employees. (GC Exh. 7.)

C. Delineation of the Issue

On October 30, the General Counsel issued the complaint and notice of hearing in this case. (GC Exh. 1e.) The complaint alleges that the Company discharged the named employees due to their union membership and activities, particularly their participation in the strike. At the commencement of the trial, counsel for the General Counsel further framed the issue as follows:

> [W]e recognize that at this point there are no jobs open for the strikers to return so we are seeking basically a creation of a preferential recall list as established by the Board in the *Laidlaw* case[13] and we would, however, like to have the notice and the remedy include a make-whole provision. [Tr. 12.]

The reference to a make-whole remedy refers to the possibility that an affected employee had "acted on that termination notice and lost something as a result," specifically vacation pay or any adverse impact on the employee's 401(k) plan. (Tr. 12.) Counsel for the General Counsel suggested that, in the event the General Counsel prevailed, the specifics of the make-whole issue could be addressed at the compliance stage of the proceedings.

Because the General Counsel's prayer for relief appeared to be significantly less broad than the nature of the relief sought in other cases alleging unlawful discharge of employees, I returned to this subject at the conclusion of the trial. I described my understanding of the key remedial issue by asking if

> The General Counsel's theory of this case is that when the [C]ompany terminated these employees who were out on strike, it violated their Section 7 rights because it has refused to accord them any sort of preferential reinstatement rights when the [C]ompany decides to hire new employees? [Tr. 244.]

Counsel for the General Counsel's succinct response was "Right. That's the long and short of it, Your Honor. Yes." (Tr. 244.) He went on to observe that "we think what they should have done instead is make a preferential recall list."[14] (Tr. 245.)

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[11] A list of the names of these employees may be found at GC Exh. 5. Each of the 28 employees named in the complaint were sent this termination letter.

[12] This exhibit is the termination letter addressed to one particular employee. All the letters were identical.

[13] *Laidlaw Corp.*, 171 NLRB 1366 (1968).

[14] Counsel for the General Counsel also stated that, as of the date of trial, there was no backpay obligation since the Company has not hired any employees.

The Company's primary defense is clearly set forth in its answer.[15] It's argument begins with the contention that:

> When the jobs of nonreplaced economic strikers are eliminated for legitimate, substantial and nondiscriminatory business reasons, and there were not, are not now, and will not be any substantially equivalent jobs to which they could be reinstated, there is no appropriate relief which can be granted under the Act to those strikers who have been terminated. [GC Exh. 1g, answer, par. VII.]

This argument is amplified as follows:

> The General Counsel is attempting, through the Complaint, to impose on the Respondent an obligation to grant indefinite preferential reinstatement rights to former nonreplaced economic strikers, whose jobs have been permanently eliminated, to vacancies that may occur in the unforeseeable future for which the economic strikers may be unqualified, or substantially less qualified than available new hires, where such reinstatement rights are not required by the Act. [GC Exh. 1g, answer, par. X.]

In order to evaluate the parties' positions, it is first necessary to undertake careful analysis of the Company's reconfiguration of its operations through the adoption of Demand Flow Technology.

D. The Demand Flow Technology Process

Dumas was the Company's primary witness regarding the nature and impact of the conversion to Demand Flow Technology. He testified that the Company had been using a traditional material requirements planning system. This system launched production orders based on projection of future demand. Once an order was launched, it was pushed through the production process. Van Kirk described the effects of this system. He reported that the Company would manufacture and stockpile large numbers of parts. The parts would then sit in storage until needed for assembly.

A concomitant of the prior method of organizing production was the manner in which the work force was deployed. Dumas testified that machinists were "narrow in their approach to the machines they ran on a daily basis." (Tr. 19.) Dumas also indicated that under this system, after setting up their machine, machinists spent considerable time simply watching it run.

Dumas enthusiastically described the new process as pulling the work through the manufacturing process by carefully managing the work organization and flow. Workers engaged in visual control of production by moving from place to place as they observed locations where work needed to be performed. This resulted in an operation where parts moved from process to process without being stored in between manufacturing stages. As a result, the Company is able to produce its products using fewer workers at a faster rate while using "less of the machine resources." (Tr. 50.) Inventory is reduced and the plant is more efficient. Furthermore, directly addressing a key issue in the past, Dumas testified that quality of the product has been improved "tenfold." (Tr. 98.) Finally, Dumas noted that the removal of cylinder production opened up a large amount of space in the facility. This allowed the machines to be "reconfigured, reorganized, regrouped." (Tr. 66.) This contributed to increased efficiency.

The requirements of the Demand Flow system affected the nature of the employees' jobs. Dumas described the fundamental nature of these changes by noting that the "job today is to know every machine in this plant, to be a flexible employee to be used wherever needed." (Tr. 77–78.) Part of this requirement is the concept of flexing. Each work assignment includes a primary cell and the obligation to perform additional production work in other cells immediately before and after the primary cell's position in the production process.

Dumas provided several examples of how the work process has changed under Demand Flow. He characterized the job in the PPL Cell as "totally changed." (Tr. 102.) The machines are arranged differently and the operator needs to deploy more skill and effort since he or she must cover "more real estate." (Tr. 102.) In addition to running the primary (or "pacing") machine, the operator must manage and control parts produced by other machines as well. The Grind Cell was cited as another illustration. This cell uses the same machines as previously, but the lot sizes of the parts have decreased dramatically so that the operator must perform "many more setups than ever done before." (Tr. 121.) Thus, Dumas summarized the impact on this cell as:

> Even though it's physically arranged like it was before and the machines haven't changed[,] the responsibility and effort and skill this operator has is greatly enhanced over what it used to be. [Tr. 122.]

Another example cited by Dumas concerned an employee, Scott Frazee, whose primary machine was located in the PUMP A Cell. Prior to the implementation of the Demand Flow system, Frazee operated two machines. After implementation, a third machine was added. Dumas opined that the job now required "a significant amount more of skill" as Frazee has to machine the part as well as manufacture and test the pump. Essentially, "[h]e has more responsibility because of the addition of the machine." (Tr. 112.) He also has flex duties in another cell as well.

The implementation of Demand Flow Technology did not result in any changes in the Company's poststrike personnel. All of the nonstriking employees continue to work under the new system. There has been no hiring of outside people and no recall of any former strikers.

[15] In its answer to the complaint, the Company also raised an issue of res judicata, contending that the complaint is barred by the findings made by the Regional Director in his letter of October 30, 2001, declining to file a complaint in response to the Union's charge alleging an unlawful refusal to provide information regarding the transfer of cylinder production. (GC Exh. 1g, par. IX.) The Company cited no authority for this proposition and did not address it in its post trial brief. Assuming, arguendo, that the Regional Director could be bound by application of the doctrine of res judicata, it is inappropriate to do so here. Nothing in the Regional Director's letter addresses the issue of preferential recall of strikers. Furthermore, the General Counsel's position throughout this trial has been completely consistent with the findings and conclusions expressed by the Regional Director in his letter.

The current work force is involved in an ongoing training process. The goal is to train each machinist so that he or she is able to operate every machine in the facility. Dumas described this objective as being of vital importance, noting that "if we don't do it we can't compete in this global market." (Tr. 108.) However, the goal is far from actual realization. Dumas confirmed that no employee has reached this level of expertise and that it will be "a couple of years" before this can occur. (Tr. 85.) As a result, currently, employees only operate those machines that they know how to run.

Van Kirk described both the theory and actuality. He endorsed the theoretical goal, observing that "[m]y job is to go to work and do whatever assignment is placed on me that day." (Tr. 215.) In practice, he testified that of the 14 existing jobs he is trained to perform 3 jobs. Thus, in reality, his work assignments are selected from among those three.

In furtherance of the ultimate goal of total employee flexibility, the Company has devised a formal training program. This involves on-the-job training and does not include any outside education such as trade school or college. Employees can volunteer for posted training opportunities selected from among the 14 work processes.[16] Upon completion of the training, they obtain certification in that work process. This concept of certification is not an outside credential, but simply an internal record of employee proficiency. Dumas testified that since the creation of this new training process as part of Demand Flow Technology, every employee has met the expectations involved in obtaining training certifications.

In describing the personnel aspects of Demand Flow, Dumas testified that the eventual goal is to move each employee every 2 hours. He opined that this would improve job enjoyment by adding variability and would also reduce the risk of repetitive motion injuries. By contrast, the system of employee compensation is essentially unchanged from before the reconfiguration. All production employees are paid the same, regardless of their assignments and regardless of the amount of training they have acquired.[17]

E. Legal Analysis

Evaluation of the parties' contentions must begin with recognition that the Act grants protection to workers engaged in strike activity. Section 2(3) provides that an individual "whose work has ceased as a consequence of, or in connection with, any current labor dispute" remains an "employee" unless he or she obtains "any other substantially equivalent employment."

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Supreme Court held that the Act's protection of striking workers included entitlement to reinstatement upon the termination of strike activity. The Court noted that it could be anticipated that, due to economic circumstances, an employer may be unable to offer immediate reinstatement to all returning strikers. In such cases, it defined the employer's duty as requiring an offer of reinstatement "[i]f and when a job for which the striker is qualified becomes available." 389 U.S. at 381. The Court acknowledged that the lower court had found that there was no evidence of antiunion motivation in the refusal to reinstate the strikers. It held that evidence of such improper motivation was not required since refusal of reinstatement was "destructive of important employee rights" under the Act. 389 U.S. at 380. The employer was required to bear the burden of proving that the refusal to reinstate strikers was due to "legitimate and substantial business justifications." 389 U.S. at 378, citing *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). Finally, the Court noted that, in its brief, the Board had suggested that such justifications could include "the need to adapt to changes in business conditions or to improve efficiency." 388 U.S. at 379.

In the following year, the Board gave further consideration to reinstatement rights in light of *Fleetwood*. In *Laidlaw Corp.*, 171 NLRB 1366 (1968), the employer hired permanent replacements during a strike. After the strike, certain of these replacement workers left the company's employ. The company declined to reinstate qualified striking employees, choosing instead to hire new workers. The Board described the "underlying principle" of the Supreme Court's decisions in *Fleetwood* and *Great Dane Trailers* to be a determination that refusal to reinstate former strikers was so inherently destructive of workers' rights under the Act that

> [h]iring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers. [Id. at 1369.]

The Board held that economic strikers who apply for reinstatement at a time when their positions are filled by permanent replacements remain "employees" under the Act and are entitled to reinstatement upon the departure of the replacements unless the employer can sustain the burden of proving that the failure to offer reinstatement was due to legitimate and substantial business reasons.

The Board further delineated the right of reinstatement in *Rose Printing Co.*, 304 NLRB 1076 (1991). During a strike, the employer hired permanent replacements. Upon the departure of several replacements, the employer hired new people to fill the vacancies. The General Counsel sought an order requiring reinstatement of strikers. The Board declined the request, finding that the available vacancies were for "entry level general worker positions . . . which were not substantially equivalent to [the strikers'] prestrike jobs because of lower pay and skill levels." 304 NLRB 1076. The Board limited the right of reinstatement to the strikers' former jobs or to other jobs which were substantially equivalent to the former jobs. The right of reinstatement did not include placement in any available job, even if the striker were qualified to perform such other job.

In *Zimmerman Plumbing & Heating Co.*, 334 NLRB 586, 588 (2001), the Board took the opportunity to summarize key aspects of the right to reinstatement:

> It is settled that both economic strikers and unfair labor practice strikers retain their status as "employees" under Section 2(3) of the Act. . . . As a result, an employer vio-

[16] Examples of the paperwork associated with this training program are in the record. (R. Exhs. 10 and 12.)

[17] I do note that while all production employees have continued to receive the same pay rate, Dumas testified that after the reconfiguration, "we found it prudent to increase their wages [across the board] because of their production." (Tr. 80.)

> lates Section 8(a)(3) and (1) of the Act by failing to immediately reinstate strikers upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so.
>
> The Board has recognized that one legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions. . . . However, a striker's right to reinstatement does not expire simply because no suitable work is available when he unconditionally offers to return to work. His right to reinstatement continues until his position or a substantially equivalent position becomes available. [Citations omitted.]

While these general principles affecting the rights of strikers form the essential legal framework, the precise issue under consideration in this case is slightly different. The General Counsel does not contend that the Company has improperly refused to reinstate any of its striking employees. The uncontroverted evidence shows that since the unconditional offer to return to work, there has never been work available for the strikers. The transfer of cylinder production and the adoption of a new method of production have reduced the need for workers to such an extent that the Company has met its production requirements entirely through use of the existing work force. It has not hired any new workers since the commencement of the strike. The General Counsel has concurred in the Company's contention that the transfer of cylinder production was made for legitimate and substantial business justifications unrelated to the strike activity. As a result, the Company has never incurred any legal obligation to reinstate striking employees.

Because this much is undisputed, the Company strongly contends that the General Counsel lacks any legal basis for its request that the Board direct the Company to maintain a preferential recall list so that its striking employees may be recalled to any of their former jobs or substantially equivalent jobs that may become available in the future. In the Company's view, there can be no statutory basis for such relief since the strikers' loss of employment was not a consequence of their decision to go on strike, but rather of the Company's decision to reduce its work force for unrelated legitimate and substantial reasons.

Upon careful reflection, I conclude that the Company's analysis is correct as far as it goes, but it fails to take into account the full import of the Act's grant to strikers of protection against discrimination. In my view, the General Counsel is not seeking (and could not seek) the requested relief as remedy for the Company's decision to reduce the number of employees working at the Omahaline facility. As the decision to reduce the work force has been found to be supported by legitimate and substantial justifications, it is privileged. While the decision to decrease the number of employees cannot give rise to any entitlement to the relief sought, the same is not true for the Company's actions taken to implement the reduction in work force. I conclude that the gravamen of the General Counsel's complaint is that the Company violated Section 8(a)(1) and (3) of the Act when it decided to reduce its work force through the method of retaining all of its nonstriking employees while terminating all of its striking employees and refusing to grant preferential recall rights to those striking employees. I further conclude that under either of the two possible legal theories, the General Counsel has met its burden of proof in this regard.[18]

I have first examined the evidence using the legal framework established by the Supreme Court in *Fleetwood* and implemented by the Board in *Laidlaw*. Under this analysis, I must determine if the Company engaged in prohibited discriminatory conduct in the manner in which it implemented the reduction in force, including the refusal to accord reinstatement rights to the former strikers. If so, I must determine whether the Company's conduct was destructive of important employee rights under the Act. Finally, I must determine whether the Company's conduct was based on legitimate and substantial business reasons.

Turning to the evidence, three things about the manner in which the Company elected to implement its reduction in force are readily apparent. First, it abandoned the sophisticated, multifaceted assessment process that it had previously employed in implementing a work force reduction. Second, it adopted a method that consisted of only one criterion, participation or nonparticipation in the strike. Third, despite the Union's request, it declined to create a preferential reinstatement process for strikers whose positions were affected by the reduction in force.

It will be recalled that, in February 2001, the Company decided to reduce its work force after suffering the loss of orders from a major customer. This was the Company's first experience with this type of problem. In response, management developed a detailed assessment tool used to perform a comparative evaluation of the employees in order to establish their relative value to the Company. It is noteworthy that, although all of the lost orders were for cylinders, the ranking system rated all employees, including those whose primary responsibilities were in the manufacture of pumps and motors. In addition, the ranking listed all employees, whether they were classified as machinists or in any of the other categories maintained by the Company. (See GC Exh. 8.) I find this intermingling of all employees regardless of job title or area of primary responsibility to be highly probative. It demonstrates that the Company's real view of its work force was of an interchangeable and flexible group of employees whose individual value was a function of such factors as knowledge of how to run a variety of machines, possession of special skills, quality of work product, attendance history, efficiency, and lack of disciplinary problems. These are the rating factors employed in the implementa-

[18] Counsel for the Respondent asserts that the General Counsel is "estopped" from pursuing a theory of inherent destructiveness to Sec. 7 rights because he "did not plead this theory in the Complaint." (R. Br. at 7–8.) No authority for this proposition is cited. The Board's Rules and Regulations do not require the General Counsel to plead legal theories in the complaint. See Sec. 102.15. The Board's processes in regard to pleadings are flexible, not formulaic. See *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959). I perceive no irregularity in the form of the General Counsel's complaint, nor do I conclude that the General Counsel is prevented from arguing any appropriate legal theory in support of its allegations made in the complaint.

tion of the reduction in force in February 2001. Using these rating factors, the Company selected employees from cylinder, pump, and motor production for termination. By the same token, it retained employees whose primary functions were in each of these three areas of production.

It is evident that management expended a great deal of thought, time, and effort to devise the ranking system used to implement the February reduction in force. It is equally evident that the purpose of this expenditure of time and effort was to retain those employees who possessed the best qualifications.

In July 2002, the Company underwent its second reduction in force, due to the transfer of cylinder operations. Instead of resorting to the assessment tool developed less than 2 years earlier, the Company simply terminated all of the striking employees and retained all of the nonstriking employees. It will be recalled that General Manager Dumas conceded, in counsel for the General Counsel's phraseology, that the "only thing that determined whether you were laid-off or not laid-off . . . [was] whether you were on strike or not." (Tr. 193.) None of the ranking factors employed in the earlier reduction in force was utilized. Only one factor remained constant. The Company continued to make its retention and discharge decisions without regard to whether an employee worked primarily in cylinder, pump or motor production and without regard to whether the employee was classified as a machinist or in some other job category. Two examples of this will suffice. Gerald Wacker was classified as a QC employee whose primary duties were in the quality inspection of cylinder parts. Despite the abolition of cylinder production and his lack of classification as a machinist, Wacker, a nonstriker, was not selected for inclusion in the reduction in force and he remains employed as a member of the Company's current production staff. By contrast, Jeff Meyer, a striker, was a machinist engaged in pump machining as his primary responsibility. Despite this, he was selected for inclusion in the reduction in force. This is particularly significant since Meyer achieved the highest overall ranking of any employee in the detailed assessment conducted in order to implement the February 2001 force reduction. Indeed, he attained a score of 273, as compared to Wacker's score of 104. The evidence overwhelmingly establishes that the Company abandoned its past practice and implemented its reduction in force by resort to only one criterion, participation or nonparticipation in the strike.

I readily perceive that the Company's decision to retain the nonstrikers and terminate the strikers was not bizarre or irrational. Obviously, the nonstriking employees were making their services immediately available to the Company, while the striking employees were withholding theirs. Nevertheless, the Company's total position leads me to infer that a motive to discriminate against the strikers formed a substantial part of its decision-making process. In drawing this conclusion, I note that the Board has reiterated that in *Tubular Corp. of America*, 337 NLRB 99 (2001).

> It is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required. [Citations omitted.]

Furthermore, the Board has noted that blatantly disparate treatment of union activists "supports an inference of unlawful motivation." *Watkins Engineers & Constructors*, 333 NLRB 818, 819 (2001). I find that the blatant disparity in treatment here—the retention of all nonstrikers and the discharge of all strikers without instituting any recall procedures—supports a strong inference of motivation to discriminate on the basis of union activity.

In my view, the strongest evidence of a discriminatory motive is revealed upon consideration of the Company's explanation for its refusal to grant preferential recall rights to enable its striking employees to resume working once vacancies become available. The Company takes the position that it no longer retains any positions that are the same as, or substantially equivalent to, the positions held by the striking employees prior to the reduction in force. The evidence belies this assertion.

The Company's contention that it no longer has qualifying jobs for the striking employees is based on its transfer of cylinder production and its adoption of Demand Flow Technology. I will address each of these points.

There is no doubt that the loss of cylinder production has resulted in a significant and apparently permanent reduction in the work force. Staffing has been reduced from a total of 70 employees in 1999 to the current total of 26. With this reduction, it may certainly be expected that many strikers will never be recalled. Nevertheless, given the nature of changing workplace conditions, some vacancies will almost inevitably occur. In *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000), the Board has described the wide array of factors that can lead to such vacancies:

> Under *Laidlaw*, an economic striker's entitlement to reinstatement is contingent upon the existence of a job vacancy. . . . "A genuine job vacancy, commonly known as a '*Laidlaw* vacancy,' may arise when, for example, the company expands its workforce or discharges a particular employee, or when an employee quits or otherwise leaves the company." [Citations omitted.]

The fact that the Company no longer manufactures cylinders is not an impediment to reinstatement, even for those employees whose former primary responsibilities were in cylinder production. The Company has never made a distinction between cylinder production and pump and motor production when deciding whether to retain staff. During its first reduction in force, it retained employees whose primary responsibilities were in cylinder production if they scored well on the overall assessment. It eliminated lower scoring staff whose primary responsibilities were in pump and motor production. Subsequently, when the Company abolished cylinder production, it retained nonstriking cylinder employees. I find that the hallmark of the Company's actual attitude toward utilization of its work force was and remains maximum flexibility. As Dumas summarized it, "we use them where we need them." (Tr. 187.) Just as the Company retained nonstriking employees whose primary functions had been in cylinder production, there is no reason to find that it would be inappropriate to recall striking employees whose primary functions had been in such production. Of course, a duty to recall striking employees can only

arise if vacancies become available in the strikers' former jobs or substantially equivalent jobs.

The Company contends that the strikers' former jobs and any substantially equivalent jobs will never become available due to the changeover to Demand Flow Technology. I find this to be a mere pretext. To be precise, I do not find that the Company's decision to adopt Demand Flow Technology was pretextual. The evidence demonstrates that adoption of this methodology was designed to meet important business goals including increased efficiency, higher quality, and increased employee productivity and job satisfaction. While the decision to adopt this system of organizing production was genuine and not pretextual, the attempt to use the adoption of Demand Flow Technology as a rationale for refusing to consider recall rights for striking employees is not rational or consistent with the evidence regarding the impact of this new system of production. I conclude that this argument is advanced as a pretext to justify discriminatory refusal to consider reinstatement of the strikers.

The Company's argument is that employees operating under the Demand Flow system have so benefited from the training provided since the commencement of the strike and have become so flexible that their current jobs are completely different from the jobs held by both strikers and nonstrikers before the conversion. Ideally, after conversion, each employee is able to operate all the machines involved in the production process and to self-direct his or her efforts so as to perform a primary function and automatically shift to performing other related functions in the production process. This is contrasted with the nature of the prestrike jobs. Those jobs were specific to one part of the production process. Employees were responsible for a specified portion of production and did not have self-directed duties elsewhere.

There are two difficulties with the Company's view of the evidence. First, the reality of Demand Flow Technology at Omahaline greatly differs from the ideal. Despite the poststrike training process, not a single employee is able to perform all of the job functions involved in the production process. Indeed, Dumas testified that achievement of this objective is at least years away. Thus, for example, Van Kirk testified that he is trained to perform 3 out of the 14 processes and his assignments are limited to those. Furthermore, the prestrike industrial process was far more flexible than the Company suggests. The evidence shows that management frequently transferred employees to temporary assignments outside their primary responsibilities. Such transfers lasted from a period of hours to a period of weeks. Reasons for such transfers included coverage for absent employees, large demand for particular parts, and down time due to broken equipment. The fact is that the Company's prestrike work force was much more flexible that the Company suggests and its poststrike work force is much less flexible than it suggests.

The second difficulty with the Company's position regarding the impact of Demand Flow Technology is that it ignores the essential similarities between the Company's pre- and poststrike operations. Dumas testified that 95 percent of the Company's product line is identical to the product line being manufactured before the strike. While all but two of the machines used to produce cylinders have been removed, no new machines have been added.[19] All of the machines formerly used to manufacture pumps and motors are still being used to manufacture pumps and motors. While two machines formerly used to manufacture cylinders have been converted to pump and motor production, no new machines have been introduced into the manufacturing process. As counsel for the General Counsel puts it:

> Nobody had to get any outside training or additional educational degrees to perform under DFT. Before the strike, employees learned new machines by working with an experienced employee. Since the implementation of DFT, employees will continue to learn new tasks by working with an experienced employee. All the jobs paid the same as each other before the strike, and still pay the same now. The employer is using the same machines to produce basically the same products. [GC Br. at 6. Citations to the transcript are omitted.]

The Company called employee Van Kirk as a witness regarding the impact of Demand Flow Technology. His testimony is illuminating. He opined that the conversion dramatically altered his job. Despite this, close examination of his testimony suggests otherwise. His assignments are only selected from among the three job processes that he has learned. He continues to make the same pump components he made before the conversion. More importantly, Van Kirk touched upon what I find to be the essential irrationality in the Company's position. He agreed that having knowledge of how to operate particular machines would give a prospective employee "an edge." (Tr. 220.) He was also asked if a prospective employee's knowledge of the Company's product line would be useful. He responded that:

> It would have a great bearing if you didn't know what the product was. You couldn't produce it. I mean, if you didn't—if you weren't familiar with it, you—there's no way you could produce it . . . you would have to be trained. [Tr. 221.]

Indeed, Van Kirk indicated that this training would have to be "extensive." (Tr. 221–222.) This is a fundamental point that is probative as to two related issues of fact. First, it reflects the fact that the Company's current jobs are the same as, or certainly substantially equivalent to, the strikers' former jobs. Second, it demonstrates that the Company's position is either irrational or discriminatorily motivated. The refusal to accord recall rights to the former strikers in preference to persons with no prior work experience for the Company is, absent an improper motive, simply inexplicable. It overlooks the substantial assets of those workers including their familiarity with the Company's current equipment and products. In fact, it rejects members of the same pool of experienced employees from which it selected the original complement of workers assigned to implement Demand Flow Technology. The only basis for having rejected these particular members of this pool of experienced employees was their participation in the strike.[20] The

[19] The two remaining cylinder-related machines have been reconfigured to meet the needs of pump and motor production.

[20] Counsel for the General Counsel cites specific instances to demonstrate that retained employees had scored lower on the 2001 assess-

suspicious nature of the Company's position has been recognized since the Board's infancy. As long ago as 1938, in an opinion affirming an early decision of the Board, Judge Learned Hand observed that a presumption of impropriety may be drawn from an employer's refusal to act on the principle that "seasoned men are better than green hands." *NLRB v. Remington Rand*, 94 F.2d 862, 872 (2d Cir. 1938), cert. denied 304 U.S. 590.

For these reasons, I conclude that the Company engaged in discriminatory conduct by selecting all the striking employees (and only the striking employees) for termination while refusing to accord them reinstatement rights. I have no difficulty in further concluding that this conduct was destructive of important employee rights in the same manner as the conduct in *Fleetwood* and *Laidlaw*. The implicit message directed to the Company's employees embedded in the heart of the Company's conduct is that the discharged employees' union activities were the cause of their selection for termination and for the Company's refusal to give them preferential consideration for any future vacancies in their former jobs or substantially equivalent jobs. The Company's decisions convey a bold, clear, and toxic message regarding the consequences of union activities.

Consideration of relevant precedents is of considerable value in assessing the Company's assertion that its decision to refuse preferential recall rights is supported by the legitimate and substantial reason that it will not have future vacancies in the strikers' former jobs or any substantially equivalent jobs.

Turning first to cases where the Board found that no qualifying jobs existed for strikers, the Company cites *Weyerhauser Co.*, 274 NLRB 972 (1985). In that case, at the conclusion of a strike, the employer terminated all of its operations at the plant in question "due to economic conditions neither caused by, nor related to, the strike." 274 NLRB at 973. All of the plant's employees, strikers and nonstrikers, were laid off. As a result, the Board adopted the administrative law judge's conclusion that there was no discrimination and, hence, no reason to reach the reinstatement issue. This is entirely different from the situation presented here. In *Weyerhauser*, all of the employees lost their jobs. In this case, all of the nonstriking employees retained employment, while all of the striking employees lost theirs. Thus, the situation presented here is the polar opposite of that addressed in *Weyerhauser*. Obviously, in W*eyerhauser*, there could be no substantially equivalent jobs since there were no jobs at all.

The Company next cites *NLRB v. Southern Florida Hotel & Motel Assn.*, 751 F.2d 1571 (11th Cir. 1985). In that case, a hotel was confronted by a strike involving some of its breakfast waitresses. It modified its breakfast service by adopting a buffet format. Nonstriking waitresses were given employment as buffet line servers. The hotel found that customers preferred the buffet breakfast and the hotel saved on labor costs. As a result, after the strike, the hotel retained the buffet format and refused to reinstate the striking waitresses. The Court held that the conversion to buffet format was made for legitimate and substantial business reasons and that the waitresses' jobs had been abolished. After the conversion, there were simply no more breakfast waitresses. This stands in contrast to the situation in this case. After the conversion, the Company had fewer production jobs. Nevertheless, it continued to have production jobs, jobs in which the employees used the same machines to produce the same products as before the conversion.

In 1992, the Board addressed this issue in *California Distribution Centers*, 308 NLRB 64 (1992). Prior to a strike, the company employed warehousemen and driver-warehousemen that performed some of the same duties. Driver-warehousemen also performed additional driving duties. Due to a change in business conditions, after the strike the company elected to employ fewer warehousemen and more driver-warehousemen. The Board approved the company's decision to decline reinstatement rights to the warehousemen, finding that the two jobs were not substantially equivalent. A key factor underlying this decision was the requirement that driver-warehousemen possess Class I drivers' licenses. The warehousemen lacked such licenses. Once again, this is significantly different from the situation encountered here. There is simply no basis upon which to disqualify the strikers from future employment. This is most clearly illustrated by noting that the nonstrikers possessed the same (and in some cases fewer) qualifications for the Demand Flow Technology jobs as did the strikers. All of the nonstriking employees were given employment. As Van Kirk's testimony illustrated, there can be no doubt that the strikers would possess qualifications arising from their knowledge of the Company's machines and products that would render them similarly qualified for reinstatement.

Finally, the Board considered two aspects of this issue in *Laidlaw Waste Systems*, 313 NLRB 680 (1994). The case involved a company that operated two facilities located in close proximity and employed drivers of four different types of vehicles. After a strike, the company refused reinstatement of several drivers. The Board upheld a portion of the company's position, finding that the different types of driving jobs were not substantially equivalent since they made different physical demands upon the drivers, required different levels of skill, and required different types of drivers' licenses. On the other hand, the Board rejected the company's claim that it was not required to offer drivers formerly stationed at one facility work at the company's other nearby facility. It based this conclusion on the fact that workers at both facilities belonged to the same bargaining unit, received the same or similar wages, maintained the same seniority system, and were permitted to transfer between the two facilities. The considerations discussed in *Laidlaw Waste Systems* do not support the Company's position since its production jobs all continue to be compensated at the same rate and continue to involve equivalent skills and qualifications.

Other precedents clearly support the General Counsel's position in this case. In another hotel case, *Arlington Hotel Co.*, 273 NLRB 210 (1984), enf. 785 F.2d 249 (8th Cir. 1986), cert. denied 479 U.S. 914 (1986), the hotel hired new workers while refusing to reinstate former strikers. The Board noted the ho-

ment than striking employees. Despite this, the Company views them as competent to perform under Demand Flow Technology while contending that the higher scoring strikers are not qualified to do so. (GC Br. at 9.)

tel's prior policy of freely transferring its employees among disparate job categories within the institution. It also noted the hotel's emphasis on training designed to maximize the capabilities of the staff. In uphold the Board's finding of unlawful conduct, the Court of Appeals observed that (id. at 251):

> Under the facts of this case, we find that the Board did not err in holding that the Hotel discriminated against the strikers by not offering them jobs for which they were qualified. The Hotel had a policy of cross-training and developing multiple capabilities for its employees.
>
> . . . .
>
> The Hotel's recall policy, therefore, clearly discriminated against unreinstated strikers in favor of new job applicants.

The hotel's policy closely matches that of Omahaline, both before and after the strike. Dumas testified that it had been the Company's policy that its employees would be "cross trained in a number of functions."[21] (Tr. 164.) In an affidavit, he characterized the employees as "very interchangeable." (Tr. 185.) If anything, the emphasis on cross-training is even greater under Demand Flow Technology. Just as with the hotel, this longstanding corporate objective completely undercuts the asserted basis for the Company's refusal to grant reinstatement rights.

In *Wright Tool Co.*, 282 NLRB 1398 (1987), enf. 854 F.2d 812 (6th Cir. 1988), the Board faced a situation quite similar to the facts in this case. Machine operators were refused reinstatement after a strike. In rejecting that company's defense bearing many similarities to the position of this Respondent, the Board affirmed the administrative law judge's characterization of the decisive circumstances (id. at 1403–1404):

> The testimony of [a witness called by the company] conceded that employees are moved from one machine to another when work for the specific machine to which an employee is assigned is low or the machine is inoperable. Respondent has not demonstrated it now has different machines and tools more difficult to operate. Nor has it shown that the qualifications of the newly hired employees are better than the long-experienced employees on the recall list and, if so, how.

Likewise, Omahaline has failed to show that despite inauguration of Demand Flow Technology, its work processes are significantly different or its striking employees less qualified than the nonstriking employees it converted to the new process.

In *Little Rapids Corp.*, 301 NLRB 604 (1993), a respondent mounted a defense to reinstatement quite similar to the assertion that Demand Flow Technology completely altered the jobs such that no substantially equivalent positions remained. The Board noted that the company had "introduced some new equipment and methods of quality control which involved employee training," but rejected this defense to the refusal to reinstate former strikers. Id. at 604 fn. 2.

In 1998, the Board further delineated the extent of strikers' reinstatement rights under *Rose Printing*, supra. In *Towne Ford, Inc.*, 327 NLRB 193 (1998), affd. in pertinent part 238 F.2d 429 (9th Cir. 2000), the company reorganized its work force after a strike. It declined to reinstate three apprentice painters to newly created jobs as polishers, despite the fact that the apprentices had performed polishing work prior to the strike. The Board held that (id. at 194–195):

> It is undisputed that polishing work was a not insignificant part of the job that apprentice painters had performed before the strike, and had the three been working as apprentice painters at the time the reorganization of the operation into three separate functions occurred, they would logically have been moved to the polisher position. Thus, in finding substantial equivalence, we are not running afoul of the *Rose Printing* rule that there is no *Laidlaw* obligation to reinstate strikers to any position for which they are qualified, without regard to what they did before the strike. Rather, we are carrying out what was acknowledged in *Rose Printing* as the Board's duty: "to ensure that strikers who have unconditionally offered to return to work are . . . treated the same as they would have been had they not withheld their service." [ICitation omitted.]

This reasoning applies with equal force here. As the counsel for the General Counsel observes (GC Br. at 11–12.):

> Had there been no strike and a nondiscriminatory reduction in force, the chances of the [reduction in force] list matching the list of strikers is nonexistent. Out of the top fifteen machinists on the Employer's February 2001 rating system who haven't quit, nine are strikers.

All of the Company's nonstriking employees were retained after reorganization. An order directing the creation of a preferential recall list simply takes a necessary step to ensure that the strikers are treated in a similar manner than they would have been had they not withheld their service.

Upon consideration of the evidence of record and the relevant precedents, I conclude that the Company has failed to meet its burden of establishing a substantial and legitimate business justification for its decision to select persons subject to reduction in force by the sole criterion of participation in the strike and its refusal to offer those individuals preferential recall status. On this basis, I conclude that the Company has violated Section 8(a)(1) and (3) of the Act.

Since I have found that the Company's actions destroyed important rights granted to the strikers under the Act and that the Company failed to meet its burden of showing a legitimate and substantial business justification for its conduct, there is no requirement that antiunion motivation be demonstrated under the test described in *Fleetwood* and *Laidlaw*. Nevertheless, I recognize that the issue in this case is slightly different from the pure reinstatement situation, albeit closely related. In *Fleetwood* and *Laidlaw*, the General Counsel sought immediate reinstatement.[22] The remedial issue here is the creation of a

[21] For example, Dumas testified that the cylinder employees were capable of doing the pump and motor work as well. (Tr. 190.)

[22] I do not wish to overemphasize the difference between the issue in *Fleetwood* and *Laidlaw* and that presented here. For example, in *Globe Molded Plastics Co.*, 204 NLRB 1041 (1973), the Board observed that "specific proof of antiunion animus [was] not required" when evaluat-

preferential recall list. In light of this difference, I have also considered the evidence by employing the analytical framework set forth in *Wright Line*.[23] This requires that the General Counsel show that the discharged employees were engaged in protected concerted activity, that the Company was aware of such activity, and that the activity was a substantial or motivating factor for the decisions to discharge and refuse preferential recall rights to those employees. If the General Counsel makes this showing, the burden shifts to the Company to demonstrate that it would have taken these same actions even in the absence of the protected concerted activity.

It is evident that the striking employees were participating in a form of protected concerted activity and that the Company was aware of their participation. In his testimony, Dumas conceded that the sole distinction between discharged employees and retained employees was participation or lack of participation in the strike. I also find that the strikers' union activities formed a substantial or motivating factor in the decisions to select them for reduction in force and deprive them of preferential recall rights. I base this conclusion on the blatant disparity in their treatment as compared to the nonstriking employees. I place great weight upon the fact that the Board endorsed precisely this analysis in a hypothetical discussion in *Laidlaw* itself. It will be recalled that the Board declined to require a finding of antiunion animus when the issue involved failure to reinstate strikers. However, in a footnote, it made the following highly pertinent observation, id at fn. 14:

> Even if a finding of antiunion motivation is necessary, the employer's preference for strangers over tested and competent employees is sufficient basis for inferring such motive, and we, in agreement with the Trial Examiner, would do so if we considered motive material.

I draw the same conclusion here.

A finding of antiunion animus is bolstered by consideration of the Company's explanations for its refusal to grant preferential recall status. I have previously discussed my reasons for concluding that these explanations are pretextual. The Board has recently observed that it is a "well settled" doctrine that "where an employer's stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal." *Key Food*, 336 NLRB 111, 114 (2001), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Having found that the Company's asserted justifications for its actions are not logical and consistent, I conclude that they are a pretext advanced to conceal antiunion animus. Thus, the General Counsel has met its initial burden under *Wright Line*. Lastly, having found the Company's justifications to be pretextual, it follows that the Company has failed to carry its burden of establishing that it would have selected the striking employees for reduction in force and refused to accord them preferential recall rights regardless of their union activities.

> Under either of the two analytical models, I find that by selecting all of its striking employees for reduction in force while retaining all of its nonstriking employees and by refusing preferential recall rights to its striking employees, the Company has violated Section 8(a)(1) and (3) of the Act. In coming to this ultimate conclusion, I have placed great weight upon the General Counsel's combination of legal theory and proposed remedy. In my view, this overall formulation of the problem presented in this case strikes a proper accommodation of the parties' competing interests within the framework of the Act. Limiting the relief sought to the creation of a preferential recall system protects the employer's economic freedom to adapt to changing circumstances by transferring aspects of production and by redesigning the remaining production processes. In the circumstances presented in this case, it also grants the employer the latitude to retain those employees who are offering their services while reducing its work force by laying off those employees who are withholding their services. As a result, the General Counsel's position affords appropriate protection to the legitimate economic interests of the employer.

While protecting the employer's lawful interests, the General Counsel's position also honors the Act's grant of protection to the striking employees in a carefully calibrated manner. By choosing to withhold their services, those employees assumed certain economic risks. The end result proposed by the General Counsel does not relieve them of the consequences of taking such risks. It is strictly confined to the protection of their rights granted under the Act. Grant of the limited relief being sought conveys to the parties the important message that participation in union activities will not subject employees to retaliation and reprisals that are motivated by animus, as opposed to adverse employer actions motivated by genuine economic considerations.

In my view, the result I am recommending achieves the same purposes as the result approved by the Board in *Lehigh Metal Fabricators*, 267 NLRB 568 (1983), enf. 735 F.2d 1350 (3d Cir. 1984). In that case, striking welders were refused reinstatement on the basis that the employer had evolved from an "unskilled fabricator to [a] quality assurance shop." Id. at 574. Because of this change, the company contended that it needed the freedom to refuse reinstatement of striking welders in order to be able to hire more highly skilled welders. The administrative law judge rejected this assertion, noting that

> [R]ecruitment of the finest welders available no doubt would contribute to this otherwise legitimate business objective.
>
> It is plain, however, that impaired reinstatement opportunities are not condoned simply because it is necessary to produce a business gain. Accommodation is necessary "between the asserted business justifications and the invasion of employee rights [considered] in light of the Act and its policy." [Citing *Great Dane Trailers*, supra.]
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> . . . .

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ing the respondent's refusal to credit reinstated strikers with past service. 204 NLRB 1041 fn. 1. From this, I conclude that issues that are promixately related to reinstatement of former strikers would involve the same framework for analysis as those that concern reinstatement itself.

[23] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 989 (1982).

> Growth in work force skill levels and an ongoing interest in improving the performance thereof through new hires is not peculiar to Respondent's needs but represents a pervasive, commonly held goal of any effective manager. Though salutary, it is not viewed in this quarter as the type of business judgment so special as to reduce an employer's obligation to reinstate the striker, if qualified, as contemplated by *Laidlaw*, to a mere duty to reinstate the striker if he is the *best qualified* that might be recruited from any source. To hold otherwise would countenance a significant impediment to employee exercise of the rights guaranteed in Sections 7 and 13 of the Act. Employees would tend to be most hesitant, perhaps to the point of refraining entirely from making common cause in legitimate strike action, were the risk of permanent replacement compounded by legal recognition of a further right in employers to select from any source, on an unverifiable, subjective basis, the individual whom management deems the most qualified. [Id. at 574–575.]

With these considerations in mind, I recommend adoption of the relief requested by the General Counsel.

CONCLUSION OF LAW

By selecting all of its striking employees for reduction in force while retaining all of its nonstriking employees, and by declining to accord its striking employees preferential recall status upon the termination of the strike, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With regard to affirmative relief, the Respondent should be ordered to devise and implement a system of preferential recall for those of its former striking employees named in the complaint.[24] It should also be ordered to offer any of such former striking employees reinstatement to any of their former jobs or other substantially equivalent jobs that become available.[25] For the reasons detailed in the body of this decision, such jobs shall include any vacancies among the Respondent's current production positions. The Respondent should also be ordered to make the former striking employees whole for any financial losses they may have suffered as a result of the unlawful conduct. As suggested by the General Counsel, determination of whether such losses have been incurred is best left to the compliance process. In the event that such financial losses are found to have been incurred, Respondent should make such losses whole, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Omahaline Hydraulics Company, a division of Prince Manufacturing Company, North Sioux City, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Selecting for reduction in force or otherwise discriminating against any employee for supporting District No. 7, International Association of Machinists & Aerospace Workers, AFL–CIO, or any other union, or participating in union activities.

(b) Refusing to accord preferential recall status to its former striking employees for any vacancies that may occur in their former jobs or in substantially equivalent jobs.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, devise and implement a preferential system for recall and reinstatement of the following persons to any vacancies in their former jobs or substantially equivalent jobs: Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J., Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark Sorenson, Shannon M. Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright.

(b) Upon the occurrence of any vacancy in a former job or substantially equivalent job, and in accordance with the terms of the preferential recall system, reinstate Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M. Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright.

(c) Make Wade Capron, John W. Carpenter, Scott E. Frazee, Bruce E. Gilbertson, Chance Hall, Gary J. Heyden, Roger Hummel, Lake Larson, David E. Linn, Toni Loker, Chris Mace, Drake C. Malm, Scott A. Malm, Jeff L. Meyer, Paul L. Mortweet, Ryan C. Nelson, Steven Parent, Mark L. Pauley, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Jeremiah G. Reese, Jim W. Reno, Allen C. Rohan, Ben J. Schrunk, Ron K. Sherril, Mark A. Sorenson, Shannon M.

[24] I note that the Company has already informed the Union that it intends to negotiate "layoff and recall" rights. (GC Exh. 7.)

[25] I do not recommend any time limit on such reinstatement rights. The Board has rejected such time limits as being contrary to the principles enunciated in *Fleetwood* and *Laidlaw*. See *Brooks Research & Mfg.*, 202 NLRB 634, 636 (1973). Of course, any individual reinstatement right will terminate under the terms of the Act if the person obtains "any other substantially equivalent employment."

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Sorenson, Kenny Swigart, Jesse D. Whittington, and Troy E. Wright whole for any financial loss suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money that may be due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in North Sioux City, South Dakota, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."